

The Administrative Law Judge awarded claimant permanent partial general disability benefits based upon an 18 percent work disability. The respondent and its insurance carrier requested this review and asked the Appeals Board to review the Administrative Law Judge's finding of work disability. Respondent contends claimant's benefits should be based upon functional impairment only. The sole issue before the Appeals Board on review is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award of the Administrative Law Judge should be modified.

On February 24, 1994 claimant injured her low back while working for respondent when she was assisting a resident of respondent's nursing home. Claimant immediately reported her injury to the respondent and sought medical treatment. The parties have stipulated that claimant has sustained a 13.75 percent functional impairment to the whole body as a result of this low back injury.

In April 1994, claimant came under treatment of orthopedic specialist Bruce R. Buhr, M.D. Dr. Buhr testified that claimant had MRI findings consistent with a herniated disc at the L4-5 intervertebral level. The doctor treated claimant through September 20, 1994 when he released claimant and recommended a 25-pound weight lifting restriction and that she avoid repetitive twisting and stooping. When he last saw claimant in June 1995, he found no reason to modify those restrictions.

At his deposition, Dr. Buhr reviewed the task analysis report prepared by Karen Crist Terrill which listed 29 job tasks that claimant had performed in the 15-year period before her February 1994 accident. He initially testified he agreed with Ms. Terrill's opinion regarding the former tasks that claimant could no longer perform. Dr. Buhr agreed with Ms. Terrill that claimant should no longer perform the following nine tasks: transferring patients; toileting residents; administering medications; bathing residents; preparing products; ordering and receiving supplies; cleaning up; taking inventory; and supervising, training and scheduling workers. On cross-examination, the doctor also indicated that claimant should not perform the three additional tasks of starting and monitoring IVs, administering treatments, and ambulating patients without assistance. It appears Dr. Buhr believes claimant cannot perform 12 of the 29 tasks presented for his consideration which equates to an approximate 41 percent task loss.

At her attorney's request, claimant was examined and evaluated by board-certified orthopedic surgeon, Edward J. Prostic, M.D., who saw claimant in December 1994. Dr. Prostic believes claimant should observe the permanent work restrictions of lifting no greater than 25 pounds in a single lift or 10-15 pounds repetitively, and that she avoid bending, twisting, pushing, pulling and vibratory equipment.

During his deposition, Dr. Prostic was asked to consider a list of 18 job tasks and he indicated claimant should not perform the following three tasks: bathing, dressing, and assisting patients in walking and turning; transporting patients; and washing and dressing bodies of deceased persons. In addition, he testified that claimant could only perform a portion of the activity of task identified as cleaning rooms and making beds, and specifically indicated claimant should not lean forward for extended periods to make beds or turn mattresses. The doctor was also concerned whether claimant could assist persons in need of emergency care because of her lifting restrictions and the potential requirement that she lift to place a bed board under a patient or whether she should clean and stock shelves. It appears Dr. Prostic believes claimant is unable to perform 6 of 18 tasks he was asked to consider which equates to a 33 percent task loss.

Based upon both physicians' testimony, the Appeals Board finds claimant is unable to perform 37 percent of the work tasks she performed in substantial and gainful employment over the 15-year period before her February 1994 accident. This finding is based upon an average of the approximate 41 percent task loss indicated by Dr. Buhr and the approximate 33 percent task loss indicated by Dr. Prostic.

The Appeals Board also finds that claimant has an approximate 18 percent difference in pre-injury and post-injury earnings. This conclusion is based upon the finding that claimant has lost approximately \$116.03 from her preinjury earnings as a result of this work-related accident and dividing that loss by the stipulated average weekly wage of \$657.34.

Because hers is an unscheduled injury, claimant's right to permanent partial disability benefits is governed by K.S.A. 44-510e which provides in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

Respondent contends claimant should be limited to permanent partial disability benefits based upon functional impairment only under the rationale set forth in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995). The Appeals Board disagrees. Foulk is not applicable because the claimant has not been offered nor has she rejected a job within her permanent restrictions and limitations wherein she could earn a comparable wage. Although respondent contends it could now accommodate claimant and employ her 40 hours per week, the respondent has not offered claimant such a position following the February 1994 accident. Therefore, it cannot be said that claimant has refused accommodated employment.

Based upon the evidence presented, pursuant to K.S.A. 44-510e the Appeals Board finds that claimant has established a 28 percent permanent partial disability which is an average of the 37 percent task loss and 18 percent difference in post- and pre-injury wages.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated December 21, 1995 should be, and hereby is, modified to award claimant permanent partial disability benefits based upon a 28 percent permanent partial general disability.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Pamela R. Thomas, and against the respondent Manor Care Nursing Center, and the insurance carrier, National Union Fire Insurance Company of New York, for an accidental injury sustained on February 24, 1994.

The claimant is entitled to 116.20 weeks of permanent partial disability benefits at the rate of \$313 per week or \$36,370.60 for a 28 percent permanent partial general bodily disability making a total award of \$36,370.60. As of May 20, 1996, the entire \$36,370.60 is due and owing and is ordered paid in one lump sum less amounts previously paid.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent to be paid directly as follows:

Barber & Associates	
Transcript of Regular hearing	\$217.00
Deposition of Ray Rancuret	\$168.00
Deposition of Janice Morris	\$189.00
Deposition of James Molski	\$190.80
Deposition of Karen Terrill	\$293.20
 Jay E. Suddreth & Associates	
Deposition of Edward Prostic, M.D.	\$Unknown

IT IS SO ORDERED.

Dated this ____ day of May 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kelly W. Johnston, Wichita KS
Stephen J. Jones, Wichita KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director